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No. 60823-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO GARCIA-SALGADO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Alejandro Garcia-Salgado challenges his conviction contending the trial court erred in admitting the fruits of two warrantless searches: the pretrial taking of a biological sample and its subsequent analysis for DNA.

B. ASSIGNMENT OF ERROR

The trial court erred in allowing the State to introduce the fruits of the unlawful searches of Mr. Garcia-Salgado's genetic material.

C. ISSUE PERTAINING TO ASSIGNMENT ERROR

The Fourth Amendment and Article I, § 7 require a search be based upon a judicial warrant supported by a showing of probable cause from sworn testimony. The collection of a biological sample and its subsequent analysis constitute separate searches. Did the trial court err in admitting DNA evidence obtained from Mr. Garcia-Salgado by the State pursuant to a court order which was not based upon probable cause nor sworn testimony?

D. STATEMENT OF THE CASE

Pablo Cruz-Guzman and his girlfriend Rachel Jerry, as well as their children, lived in a house owned by Ms. Jerry's mother

Joylene Simmons, along with Ms. Simmons's two sons, daughter-in-law, and two other daughters including P.H. 9/19/07 RP 29-30

One evening Mr. Cruz-Guzman invited his friend, Mr. Garcia-Salgado, to the house where the two of them, along with Ms. Jerry and one of her brothers, Derrick, played dice and drank in the garage. 9/20/07 RP 65. While they were doing so, Ms. Simmons and P.H. went to bed upstairs. Id. at 66.

At some point, Mr. Cruz-Guzman, left the house with Derrick and his wife to buy more beer. 9/20/07 RP 69-70. Before they returned P.H. woke her mother. 9/19/07 RP 29-30. P.H. testified she was half asleep when she noticed Mr. Garcia-Salgado enter her bedroom using a cell phone for light. 9/25/07 RP 58. P.H. testified Mr. Garcia-Salgado removed her pants, got on top of her, and that she could "feel his body against [her] body . . . in her private spot." Id. 61.

Police responded to Ms. Simmons's 911 call. 9/19/07 RP 79. Mr. Garcia-Salgado was arrested and while at the Auburn Police station made a statement that he had not had intercourse with P.H. 9/19/07 RP 164.

Mr. Garcia-Salgado was charged with a single count of first degree rape of a child, as well as possession of cocaine, for drugs found at the time of his arrest. CP 1-5.

Prior to trial the deputy prosecutor asked the court to order Mr. Garcia-Salgado to submit a biological sample to permit DNA testing. 3/27/07 RP 3. The State did not offer an affidavit or sworn testimony to support its request. Over Mr. Garcia-Salgado's objection, Id. at 4, the court granted the State's request. Id. at 5. Rather than determine probable cause existed to issue a search warrant, the court merely issued an order finding the method of gathering the sample, a cheek swab, was minimally intrusive. CP 6.

Technicians at the Washington State Patrol Crime Laboratory, testified DNA found in a small amount of semen on the underwear and shirt P.H. was wearing matched Mr. Garcia-Salgado's. 9/20/07 RP 146-52.

The jury convicted Mr. Garcia Salgado as charged. CP 63.

E. ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING THE FRUITS OF A WARRANTLESS SEARCH

1. The compelled collection of a biological sample is a search under either the state or federal constitutions. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." The collection and subsequent analysis of biological samples from an individual constitutes a search for purposes of the Fourth Amendment. Ferguson v. City of Charleston, 532 U.S. 67, 76, 121 S.Ct. 1281, 149 L.Ed. 2d 205 (2001); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); State v. Olivas, 122 Wn.2d 73, 83-84, 856 P.2d 1076 (1993). Moreover, such actions infringe upon the privacy interests protected by Article I, § 7 of the Washington Constitution. State v. Curran, 116 Wn.2d 174, 184, 804 P.2d 558 (1991).

Under both the federal and state constitutions the collection and subsequent analysis of biological evidence from a person is not

a single search but rather involves at least two separate invasions of privacy. The Supreme Court has said

> In light of our society's concern for the security of one's person it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests.

Skinner, 489 U.S. at 617 (Internal citations omitted). This Court has echoed this sentiment stating:

> The invasion in fact is twofold: first, the taking of the sample, which is highly intrusive, and second, the chemical analysis of its contents--which may involve still a third invasion, disclosure of explanatory medical conditions or treatments.

Robinson v. Seattle, 102 Wn.App. 795, 822 n.105, 10 P.3d 452 (2000).

Thus, there can be no question that the collection and subsequent analysis of the biological sample from Mr. Garcia-Salgado each constituted a search for purposes of the Fourth Amendment as well as Article I, § 7. See, Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (blood draw "plainly constitutes search[]" for purposes of Fourth Amendment).

2. The state and federal constitutions each generally require a judicially issued search warrant. The Fourth Amendment provides ". . . no Warrants shall issue but upon probable cause supported by Oath or affirmation . . . ." Article I, § 7 provides "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

A search is not reasonable unless it is pursuant to a judicial warrant based upon probable cause or falls within an exception to the warrant requirement. Skinner, 489 U.S. at 619 (citing Payton v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980); Mincey v. Arizona, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978)). The warrant requirement is particularly important under the Washington Constitution "as it is the warrant which provides 'authority of law' referenced therein." State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing Seattle v. Mesiani, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)). The State bears a heavy burden to prove the warrantless search at issue falls within an exception. See State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996); Mesiani, 110 Wn.2d at 457-58.

In the present case there was no warrant, merely an order from the court directing Mr. Garcia-Salgado to submit to the search.

CP 6. The order the court issued was not premised on probable cause. Finally, the statements and arguments of the deputy prosecutor do not satisfy the "Oath or affirmation" requirement.

> Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found . . . .

State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). In the context of an intrusion of one's body to collect a biological sample, "the interests in human dignity and privacy which the Fourth Amendment protects forbid any intrusion on the mere chance that the desired evidence might be obtained." Schmerber, 384 U.S. at 757 Instead, the Fourth Amendment requires "a clear indication that in fact such evidence will be found." Id.; Curran, 116 Wn.2d at 184. Schmerber made clear that probable cause to arrest an individual was not alone sufficient to justify such a search; "the mere fact of a lawful arrest does not end our inquiry." 384 U.S. at 769.

The deputy prosecutor requested the search in this case stating:

> It is typical for defense attorneys not to be ecstatic about giving DNA of the client's to the State. . . . . However, despite this lack of enthusiasm, courts

> regularly grant State permission to get such a sample in the interest of justice.

3/27/07 RP 3. The trial court inquired whether the samples obtained from the victim had been tested to find DNA other than the victim's. Id. at 4. The State responded: "I believe the presumptive tests were done, and there was something on them: I couldn't say exactly what at this point in time." Id. at 5. Thus, the State did not have a "clear indication" that the search would result in evidence but simply held out hope "that the desired evidence might be obtained." The Fourth Amendment does not permit such a search. Schmerber, 384 U.S. at 757.

Even if one could conclude the deputy prosecutor's "everyone's-doing-it" argument established probable cause, the deputy prosecutor did not submit an affidavit or declaration in support of her request, nor did she offer her statements under "Oath or affirmation." The State did not comply with the plain requirements of the Fourth Amendment.

The ensuing searches, the collection and subsequent analysis, violated both the Fourth Amendment and Article I, § 7.

3. The provisions of CrR 4.7(b)(2)(*vi*) do not allow the warrantless searches in this case. The court's order requiring Mr.

Garcia-Salgado submit to the searches in this case cites to CrR 4.7. CP 6. CrR 4.7(b)(2) provides in relevant part :

> Notwithstanding the initiation of judicial proceedings, **and subject to constitutional limitations**, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to
> . . . .
> (vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body . . . which involve no unreasonable intrusion thereof
> . . . .

(Emphasis added).

By its very language the court rule requires the taking of any sample from a defendant comport with constitutional limitations. As set forth above, the Fourth Amendment and Article I, § 7 require a search warrant based upon probable cause to jusitfiy the taking of a biological sample for DNA testing.

Nor could the court rule permit the warrantless search which occurred in this case.

> "Statutory authorization" references a statute authorizing a *court* to issue a warrant, not a statue dispensing with the warrant requirement" Seattle v. McCready, 123 Wn.2d 260, 274, 868 P.2d 134 (1994); see also, In re the Personal Restraint of Maxfield, 133 Wn.2d 332, 345, 945 P.2d 196 (1997). (Madsen, J., concurring) ("Except in the rarest of circumstances, the 'authority of law' required to justify a search pursuant to article I, section 7 consists of a valid search warrant or subpoena issued by a neutral magistrate. This court has never found that a statute

> requiring a procedure less than a search warrant or subpoena constitutes 'authority of law' justifying an intrusion into the 'private affairs' of its citizens. This defies the very nature of our constitutional scheme and would set a precedent of legislative deference that I am unwilling to accept in our state's constitutional jurisprudence. It is the court, not the Legislature, that determines the scope of our constitutional protections.") (Citation and footnotes omitted).

Ladson, 138 Wn.2d at 352, n. 3. Thus, if CrR 4.7 is read to dispense with the warrant requirement a resulting search would not be conducted with the "authority of law."

4. The trial court erroneously admitted the fruits of the unlawful search. Where there has been a violation of the Fourth Amendment, courts must suppress evidence discovered as a direct result of the search as well as evidence which is derivative of the illegality, the "fruits of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Article I, § 7 also requires exclusion of evidence obtained in violation of its terms. State v. White, 97 Wn.2d 92, 111, 640 P.2d 1061 (1982). Evidence that Mr. Garcia-Salgado's genetic profile matched that found in the evidentiary

semen sample was a fruit of the unlawful searches and should have been suppressed.

5. Mr. Garcia-Salgado may raise this issue on appeal. Mr. Garcia-Salgado objected to the search arguing it was "an unreasonable intrusion of his privacy and his person." 3/27/07 RP 3. The court nonetheless issued the order without any consideration of the constitutional limitations on such a search. Thus, Mr. Garcia-Salgado may raise the issue on appeal. RAP 2.5.

The failure to seek suppression of the fruits of the unlawful search pursuant to CrR 3.6 after the court ordered Mr. Garcia-Salgado submit to the search does not preclude review in this case. First, the contemporaneous objection at the time the order was issued provided the State and trial court a full and fair opportunity to address the constitutionality of the request. Second, the record is fully developed to permit this Court to consider the issue on appeal. Specifically, there is a transcript of the hearing at which the State set forth the basis for requesting the order. That record plainly indicates the lack of probable cause to support the search and the absence of sworn testimony. There was no search warrant nor accompanying affidavit. There are no additional facts necessary to the resolution of this claim. To foreclose Mr. Garcia-Salgado's

challenge on appeal merely because his attorney failed to subsequently seek suppression would serve only to put form above function.

6. If the court concludes the failure by defense counsel to file a motion pursuant to CrR 3.6 precludes appellate review, then that failure deprived Mr. Garcia-Salgado of the right to the effective assistance of counsel.

a. Mr. Garcia-Salgado had the right to the effective assistance of counsel. The Sixth Amendment guarantees the right to the effective assistance of counsel in a criminal proceeding. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)). If he does not have funds to hire an attorney, a person accused of a crime has the right to have counsel

appointed. Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The right to counsel includes the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Strickland, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. Strickland, 466 U.S. at 687; McMann, 397 U.S. at 771. To prevail on a claim that he was denied this right:

> First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

b. Mr. Garcia-Salgado's trial counsel rendered ineffective assistance of counsel by failing to timely file the motion to suppress evidence. "The presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below." State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

As discussed above, the searches in the present case plainly violated the warrant requirements of both the state and federal constitutions. Had defense counsel made a motion to suppress, that motion would likely have been successful. Even if such a motion had not prevailed in the trial court, Mr. Garcia-Salgado would have been able to litigate the issue on appeal. The failure to timely file the motion to suppress fell below the performance of reasonably effective attorney given the meritorious nature of the motion.

c. Mr. Garcia-Salgado was prejudiced by counsel's failure to timely file the motion to suppress. "[A] defendant bears the burden of showing, based on the record developed in the trial court, that the result of the proceedings would have been different but for counsel's deficient performance." Contreras, 92 Wn.App. at 318 (citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

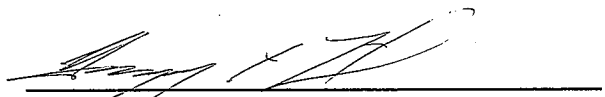
As discussed at length above, a motion filed to suppress the warrantless searches was not only viable but would have succeeded. Without the fruits of the unlawful search, the State's proof of the rape of a child charge would have been substantially weakened. The State's evidence of "sexual intercourse" consisted

of P.H. testifying she could feel Mr. Garcia-Salgado's body against "her private spot." 9/25/07 RP 61. In his statement to police, offered by the State at trial, Mr. Garcia-Salgado's denied having intercourse with P.H. 9/19/07 RP 164. Evidence from the crime lab technicians that the probability that someone other than Mr. Garcia-Salgado was the source of the semen recovered from P.H.'s clothing was a minuscule 1 in 13 trillion plainly tipped the scale. The deputy recognized the importance of this evidence when in her closing argument she said: ". . . and what do we have to corroborate what [P.H.] said? . . . The defendant's DNA is probably the best thing." 9/26/08 RP 12. The failure to seek suppression of this evidence led directly to Mr. Garcia-Salgado's conviction. Moreover, if this Court concludes the failure to file such motion precludes review of the substantive issue, defense counsel's failure to file a motion to suppress will have also precluded Mr. Garcia-Salgado's ability to challenge his convictions on appeal. Mr. Garcia-Salgado has been prejudiced by defense counsel's professionally unreasonable representation. He is, therefore, entitled to reversal of his conviction for rape of a child.

F. CONCLUSION

For the reasons above, this Court must reverse Mr. Garcia-Salgado's conviction.

Respectfully submitted this 14th day of July, 2008.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. ALEJANDRO GARCIA-SALGADO, Appellant.	)))))))))	NO. 60823-1-I

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 14TH DAY OF JULY, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF JULY, 2008.

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